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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X
IN RE: WORLD TRADE CENTER DISASTER SITE LITIGATION

DOCKET NO.: 21 MC 100 (AKH)

AFFIRMATION IN RESPONSE TO MOTION OF WGENB, LLP. FOR COMMON BENEFIT FEES
--X

FLORRIE L. WERTHEIMER, an attorney duly admitted to practice law before this Court, affirms the following under the penalties of perjury:

1. That I am an attorney with the firm of WERTHEIMER ASSOCIATES, P.C. and as such I am fully familiar with the facts and circumstances which are addressed in this affirmation.

2. I make this affirmation in opposition to the firm of Worby Groner Edelman & Napoli Bern, LLP's (hereinafter "WGENB") motion for 5% of the net proceeds of selective plaintiff's legal fees.

3. In the alternative, should WBENB be entitled to a common benefit fee, then this firm respectfully requests that a common benefit fund be established to which all firms contribute and a hearing be held to ascertain whether other firms contributed work to the common benefit of the plaintiffs in this docket and should be compensated therefore.

4. The common benefit fund is a species of *quantum meruit* recovery. It was established in the context of class action lawsuits to prevent the representative plaintiff

from having to bear the brunt of the expenses of a litigation from which non-active plaintiff's would benefit without lifting a finger to litigate. Clearly, this is not the situation in the World Trade Center cases. Some firms did work which inured to all; some just did their own work. But prior to a lead counsel being appointed, all firms litigated these cases as befits any other personal injury, toxic tort action.

5. Curiously, any putative fund has already been materially depleted by the WGENB in advance of any determination of whether or not any other firm has an interest in any fraction of it. WGENB has stipulated with other liaison firms not to tax their settlements. Arguably, these firms, having the lion's share of the cases, would have contributed the significant monies to the common benefit fund. Since WGENB has stipulated away more than 50% of the fund, then the percentage hold back should be similarly reduced. If the Court finds in its discretion that WGENB is entitled to the entire hold back, that hold back percentage should be commensurate with the percentage of the attorneys forced to contribute to it. If WGENB is comfortable bargaining away 5% of millions of dollars, the other attorneys not privy to the stipulation should not have to make up this deficit.

6. Plaintiff's co-liaison counsel also breached its fiduciary duty to the plaintiffs when it negotiated this stipulation with only three law firms. First of all, it is self-dealing because this deal confers a benefit on only three law firms out of the dozens which these three purport to represent, and seek contribution from, for this representation. Second, this side deal depletes a fund whose ownership is not yet determined. If there is any chance whatsoever that a plaintiff's counsel will challenge the award of the entire 5%, then it is not for WGENB to be deciding by how much they are willing to deplete the fund. These side stipulations should be vacated. Either all firms contribute or none do.

7. Not only does it seems counterintuitive to exempt the many and take only from the few, this appears to be self-dealing which is contrary to the fiduciary position of liaison counsel, as this firm was not offered such a stipulation by its "Liaison", not made aware of such a stipulation, and not invited to so stipulate. It would also seem premature, as Plaintiff's Liaison does not have anything to negotiate away, or deplete, pending the Court's decision on these motions.

8. It defies common sense that WGENB is seeking funds from plaintiff's attorneys who were compensated *the least* from this litigation. If it is so important for WGENB to be made whole by contributions in homage to its labor, then it should seek money from the firms who stand to contribute the most.

9. As liaison counsel, WGENB did nothing more than would have been required of it had it been the only law firm prosecuting these cases. With its 10,000 cases, it did what was required of it, and now WGENB wants us to pay for what it has benefitted from more than any other firm.

10. This office had two plaintiffs who were injured in the Deutsche Bank building. Since these were the only two plaintiffs in this docket with Deutsche Bank as a defendant, this office was to fend for itself as to this defendant. This issue became moot however, because this office was not made aware of the requirement that it would have to dismiss its claims against non-settling defendants or lose the opportunity to go the Victim's Compensation Fund. Even though WGENB knew about this and worked it to their own benefit, they never informed plaintiffs of this. This office found this out from defendant's counsel on the eve of the Bill's signing and had to scramble to protect its clients' rights to go to the VCF. In fact, throughout this entire litigation, this office has gotten more of its information from defendants counsel and the newspapers than from plaintiff's liaison. Had this office been made aware of this possibility, then perhaps we could have negotiated something with Deutsche Bank. Maybe not. It would have been

nice to have had a clue. But because of the complete lack of guidance from liaison counsel, this firm was deprived of the necessary knowledge to make an informed decision.

11. Alternatively, should the common benefit fund be established through a hold back, then it is respectfully requested that a hearing be had to ascertain whether any other law firms contributed to the common benefit.

12. It is to be noted that this firm filed its first cases in 2002 on behalf of forty-five (45) NYC Sanitation workers. After these petitioners had been granted leave to file late notices of claim, the City appealed. Our efforts on appeal gave rise to a favorable ruling on late notices of claim, *In the Matter of Edwards*, 2003 NY Slip Op. 18997 [2 AD3d 110] (App.Div. 1st Dept. 2003) decided in late 2003. WGENB refers to the *Felder Appeal* in its papers. *Felder* cites to *In the Matter of Edwards* in support of its holding.

13. The City then went on to hold forty-five (45) 50-h hearings in these actions, the transcripts of which were, upon information and belief, reviewed by Napoli's firm.

14. Farther down the road in the litigation of these cases, this firm deposed officers of the Department of Sanitation, including Dennis Diggins and Michael Mucci, transcripts of which were shared with the Napoli firm at their request.

15. In the meantime, this firm filed actions under the Jones Act against the City of New York in the Southern District for injuries incurred as a result of the City's negligence in the wake of 9-11. Because these were Jones Act cases, they were not put into the MC dockets. Numerous depositions were done, including a lengthy deposition of Steven Levin, M.D. of Mount Sinai Hospital, and a seven hour deposition of Aboaba

Afilaka, M.D. of Mount Sinai Hospital. Both of these depositions are in the possession of Napoli's firm.

16. In one of the aforementioned cases, this firm did a Daubert hearing of Dr. Afilaka before Magistrate Maas. Upon information and belief, this was one of the only such hearings done of World Trade Center illnesses and undoubtedly informed the defendants of some possible hurdles when the Court held that Dr. Afilaka would be allowed to testify as to causal connection before a jury in the Southern District. In fact, Mr. Napoli contacted the head of this firm, Florrie Wertheimer, and implored her to allow him to try the case. Mrs. Wertheimer declined the offer.

17. This office hereby requests that a hearing be held to assess whether other firms have done work which, in any amount, has benefitted plaintiffs other than the ones which have retained them directly. It is respectfully posited that this firm, and, upon information and belief, other firms, did work which inured to the benefit of all, and that petitions to the Court should be entertained.

18. IN VIEW OF THE FOREGOING and in light of the "insider dealings" of liaison counsel, which bargained away the lion's share of the putative hold back, it is respectfully requested that there be no common benefit fund established in this docket. Further, because of WGEBN's lack of diligence in its duties as liaison counsel, no common benefit fees should be allotted to that firm.

In the alternative, should the Court, in its discretion, determine that a common benefit fund is appropriate, then it is respectfully requested that a hearing be held to ascertain whether other counsel should be entitled to any monies from this fund.

Pursuant to 28 U.S.C. § 1746, I declare under the penalties of perjury that the foregoing is true and correct, except to those things stated upon information and belief and as to those things, I believe them to be true. Executed this 28th day of January, 2011.

WERTHEIMER ASSOCIATES, P.C.

By: ______________________________

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